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ALL THINGS VISIBLE AND INVISIBLE: THE LOCATION OF INTANGIBLE PROPERTY FOR RULE B ATTACHMENT PURPOSES

*Kyle M. Brennan**

I. INTRODUCTION

For the recent history of admiralty law in the United States, attachment of a defendant's assets under Rule B of the admiralty supplement to the Federal Rules of Civil Procedure has been an invaluable tool for both obtaining jurisdiction over absent defendants and obtaining security for pending arbitration or litigation awards. As global shipping expands and diversifies, defendants in this industry will become increasingly difficult to locate for jurisdictional purposes; litigation and arbitration awards will also become more prominent. So attachment of a party's assets located in a court's jurisdiction when that defendant cannot be found in person will be an increasingly attractive procedural device. The scope of property types seizable under this process will expand as well.

Rule B of the Federal Rules of Civil Procedure allows plaintiffs to attach property located within a federal judicial district in the United States, provided that the property's owner cannot be found in that district for purposes of process or jurisdiction.¹ Rule B allows for attachment of both tangible and intangible property.² While case law abounds with examples of attachment of tangible property, attachment of intangible property remains relatively novel and untested within admiralty jurisprudence in the United States. Given the rise of global shipping and the increasing use of intangible money as currency (for example, wire transfers, promissory notes, letters of credit, etc.), the attachment of intangible property under Rule B will almost certainly become an increasingly common practice. Knowledge as to where such property might be considered located for attachment purposes will help maritime practitioners in navigating these kinds of cases.

This Article will explore Rule B case law for guidance on the location of intangible property assets and, if none exists, will look to statutory law or treatises on the relevant type of property. This Article will also rely heavily on Articles 5, 8, and 9 of the Uniform Commercial Code.³ This Article will examine intangible things of value that may have relevance to admiralty law, including corporate stock shares, bank accounts, letters of credit, negotiable

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1. FED. R. CIV. P. SUPP. B.

2. *Id.*

3. The Uniform Commercial Code is codified by each state and is relevant in admiralty jurisdiction if general maritime law is silent on a particular issue, which it is with regard to the location of commercial instruments. *See, e.g.,* Southworth Mach. Co., Inc. v. F/V Corey Pride, 994 F.2d 37, 40-41 (1st Cir. 1993); Berge Helene Ltd. v. GE Oil & Gas, Inc., 896 F. Supp. 2d 582, 597 (S.D. Tex. 2012).

instruments, and intellectual property rights. Electronic fund transfers, the attachment of which was outlawed in the United States Court of Appeals for the Second Circuit,⁴ will be examined insofar as case law has stated the location of such funds and as a primer on the extent to which these transfers may shed light on the location of bank accounts. Insurance policies, bills receivable, and other types of intangible rights of action, including money due on a note and damages due for a breach of contract or tort, will not be examined here.

II. THE LEGAL ASPECTS OF MONEY AND PROPERTY

Before delving into the specifics of intangible property and maritime rules of attachment, it may be helpful to briefly explore the concept of money itself from a more abstract perspective. In the mid-twentieth century, British scholar F.A. Mann wrote a book called *The Legal Aspects of Money* that pondered questions that had historically been taken for granted among legal scholars.⁵ Mann wanted to provide a fundamental overview of what money really was and how it functioned under the law in its most reduced essence. Mann sought to examine non-economic definitions of money and chose the following broad definition: “The quality of money is to be attributed to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as universal means of exchange in the State of issue.”⁶

Mann’s book was eye opening because it revealed that what laypeople consider money—the bank notes in our wallets or the coins in our purses—is not money at all; it is merely paper and metal. Money, in the legal sense, is a promise, or a debt, owed by a government and evidenced by a document that indicates that the government will honor the amount stated in the document based on the strength of its national currency. In other words, by issuing bank notes, a government is telling the holder of that bank note that it will back the amount stated thereon for any debt owed by the holder to any other person.⁷ Similarly, bank deposit accounts also do not contain money *per se*, but are rather evidence of a debt that the bank owes to the customer in whose interest it maintains that account.⁸ Mann’s analysis also indicates that money is something separate from credit, which would exist with a credit card or a charge card.⁹

Mann first coherently raised the issue of money as debt in a legal context. This is significant because it indicates that many forms of valuable property that laypeople think of as “money” (for example, bank notes, deposit accounts, negotiable instruments, etc.) are really just paper and are only documentary records of some kind of broader, inchoate right or relationship.

Characterizing money as a debt is a useful means of revealing the

4. *Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58, 72 (2d Cir. 2009).

5. F.A. MANN, *THE LEGAL ASPECTS OF MONEY* (4th ed. 1982).

6. *Id.* at 8.

7. *Id.* at 9. *See also* MARK DUBOVEC, *THE LAW OF SECURITIES, COMMODITIES, AND BANK ACCOUNTS* 109-10 (2014) (“Currency is . . . a bank note [issued by a government] that expresses a promise of the government to pay the bearer on demand.”).

8. MANN, *supra* note 5 at 5.

9. *Id.* at 8-11.

relationship between the debtor and the beneficiary of the debt. The issue then arises as to where such a debt is located. The most logical, perhaps painfully obvious, answer to that question is that it is located wherever it exists. But where is that? As a rule of thumb, and as inferred from Mann's *The Legal Aspects of Money*, a debt really exists wherever it can be utilized or properly disposed of by its right holder.¹⁰ This rule of thumb will be a recurring theme throughout this Article. While Mann pondered the question of "what is money?," this Article will focus on "where is money?," specifically money as evidenced by some form of intangible property.

III. THE NATURE OF INTANGIBLE PROPERTY

Before discussing the location of intangible property for attachment purposes, the nature of intangible property itself must first be solidified. "Intangible property" is a subset of personal property that generally encompasses all incorporeal rights.¹¹ Incorporeal rights include choses in action, which are rights of action or, more specifically, rights of action evidenced by some kind of document, such as chattel paper.¹²

Intangible property does not really entail a right related to a physical thing, but rather evidences a relationship between persons or entities that the law recognizes and will enforce.¹³ Intangible property, in and of itself, does not have any physical existence, but is often evidenced by documentary intangibles, such as stock certificates, letters of credit, and promissory notes.¹⁴

Given the amorphous nature of intangible property, a brief survey of choice-of-law rules relating to intangible property may be instructive. The old choice-of-law rule to be applied to intangible property is *mobilia sequuntur personam*, or "the property follows the person."¹⁵ In other words, intangible property has its situs at the domicile of the owner of that intangible property.¹⁶ This maxim is contrary to Rule B's function in admiralty because Rule B can only be used to attach property located in a jurisdiction when its owner cannot be found *in personam*. But *mobilia sequuntur personam* also states that a debt follows the creditor and is located at the domicile of the creditor.¹⁷ This rule is facile because an intangible, as evidence of an amorphous legal right of action, exists everywhere and nowhere at the same time. Therefore, actual control over an intangible is likely more important than the domicile of an intangible's owner.

The new choice-of-law rule for intangibles considers first the type of intangible involved by way of determining its situs. For example, a promissory note, as documentary proof of a promise to pay a certain sum of money, is

10. See *id.* at 67, 70-76.

11. 63C Am. Jur. 2d Property § 18 (citing *Parsowith v. Dept. of Revenue*, 723 A.2d 659, 206 (Pa. 1999)).

12. *Id.* § 23.

13. *Id.* § 9 (citing *Curry v. McCanless*, 307 U.S. 357, 365-66 (1939); *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 819 (3d Cir. 1994)).

14. *Id.*

15. See *Campbell v. Bagley*, 276 F.2d 28, 31 (5th Cir. 1960).

16. *Id.*

17. See *Wilkins v. Ellett*, 76 U.S. 740, 743 (1869).

considered to be located where the note itself is located,¹⁸ while the location of an un-certificated stock traded through an intermediary, as will be discussed in detail below, exists where the intermediary trader is located.¹⁹

Intangible property for purposes of attaching such assets presents a unique problem. Rule B attachment, as will be explained below, requires intangible assets to be located in the federal judicial district in which attachment is sought. By definition, however, intangible properties often have no physical location and are mere evidence of obligations that often take documentary form. This raises a number of possibilities for locating an intangible asset. The procedure for Rule B attachment will shed further light on such possibilities.

IV. RULE B ATTACHMENT PROCEDURE

Before discussing the location of specific intangibles, a discussion of the procedure for attachment of property under Rule B of the admiralty supplement to the Federal Rules of Civil Procedure is necessary. Rule B attachment is a *quasi in rem* action used to obtain *in personam* jurisdiction over an absent defendant. It is also used to obtain *in rem* financial security against a defendant to satisfy future judgments.²⁰ Rule B is a necessary tool of maritime law given the highly transient and amorphous nature of this industry.²¹ As the Second Circuit explained in *Polar Shipping Limited v. Oriental Shipping Corporation*:

A ship may be here today and gone tomorrow, not to return for an indefinite period, perhaps never. Assets of its owner, including debts for freights . . . within the jurisdiction today, may be transferred elsewhere or paid off tomorrow. It is for these reasons [that Rule B was] developed.²²

Rule B attachment is a highly effective tool for plaintiffs because attachment orders are granted *ex parte* and the plaintiff need not prove the merits of its claim before obtaining an attachment.²³ But Rule E(4)(f) of the Supplemental Rules for Admiralty allows defendants to immediately contest attachment before a district court judge.²⁴ This balance makes Rule B a powerful instrument for plaintiffs and also a relatively fair one for defendants.²⁵

In order for a plaintiff to obtain a Rule B attachment order from a federal judge, the plaintiff must satisfy four requirements.²⁶ First, the plaintiff must

18. See *In re Saddy*, 129 N.Y.S. 163, 166 (N.Y. App. Div. 1954).

19. See, e.g., Uniform Commercial Code §8-110(b); *MAISIE OOI, SHARES & OTHER CERTIFICATES IN THE CONFLICT OF LAWS* 78 (2003).

20. *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263, 268 (2d Cir. 2002).

21. See *Vitol, S.A. v. Primerose Shipping Co., Ltd.*, 708 F.3d 527, 538 (4th Cir. 2013) (discussing the prevalence of alter egos in the shipping industry).

22. *Polar Shipping Limited v. Oriental Shipping Corporation*, 680 F.2d 627, 637 (9th Cir. 1982).

23. Adam Gold, *The Calm After the Storm? UCC Article 4A, Jaldhi, and the Future of Rule B Attachment in the Second Circuit*, 2 GEO. MASON J. INT'L COM. L. 14, 17-18 (2010).

24. FED. R. CIV. P. SUPP. E(4)(f).

25. Gold, *supra* note 23 at 17-18.

26. *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 445 (2d Cir. 2006); see also *Blue Whale Corp. v. Grand China Shipping Dev. Co., Ltd.*, 722 F.3d 488, 493 (2d Cir. 2013).

establish that it has a *prima facie* claim in admiralty against the defendant.²⁷ Second, the plaintiff must show, to the best of its knowledge, that the defendant cannot be found within that federal judicial district for service of process or for jurisdictional purposes.²⁸ Third, the plaintiff must establish that the defendant's property, be it tangible or intangible, can be found within that district.²⁹ Fourth, the plaintiff must state that no bar to attachment exists under statutory or maritime law.³⁰ Note also that a right to attachment cannot accrue until the defendant comes into possession of the property to be attached or is about to come into possession.³¹

Attachment of property under Rule B is a maritime remedy unique to the United States. Many other jurisdictions around the world have *in rem* property seizure, but not *quasi in rem* attachment of property.³² Attachment of property arose in the United States because maritime defendants are often, by their inherently international nature, more difficult to locate than defendants in a traditional civil action.³³ Thus, it is preferable to seize property in order to compel an absent defendant to appear in court in the United States and to guarantee assets in the event of a judgment against that defendant.³⁴

With this context in mind, the location of different intangibles for purposes of Rule B attachment will be better illuminated.

V. THE LOCATION OF INTANGIBLE PROPERTIES

A. Corporate Shares

Attachment of corporate shares under Rule B of the supplemental rules for admiralty is a relatively novel concept. Little case law exists on attachment of this property type, but the location of corporate shares has been thoroughly documented through Article 8 of the Uniform Commercial Code and from a range of case law. Corporate shares, as evidenced by documents such as stock certificates, are valuable ownership interests in the capital of corporations and therefore represent a powerful mechanism for maritime plaintiffs to assert under Rule B.

1. What is a share?

Corporate shares are fundamental evidence of an ownership interest in a

27. *Aqua Stoli*, 460 F.3d at 445; see also *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580, 582 (2d Cir. 1963).

28. *Aqua Stoli*, 460 F.3d at 445. "Jurisdiction" under this prong means the traditional "minimum contacts" with a forum needed for *in personam* jurisdiction. See *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

29. *Aqua Stoli*, 460 F.3d at 445.

30. *Id.*

31. *Reibor Int'l, Ltd. v. Cargo Carriers (KACZ-CO), Ltd.*, 759 F.2d 262, 268 (2d Cir. 2000) (holding that after-acquired property clauses do not grant a maritime defendant a property interest that can be attached by a plaintiff in property that the defendant has not yet acquired).

32. See William Tetley, *Arrest, Attachment, & Related Maritime Law Procedures*, 73 TUL. L. REV. 1895 (June 1999).

33. *Aqua Stoli*, 543 F.3d at 443.

34. *Id.*

corporation.³⁵ Stocks as property entail two separate things: (1) the corporate ownership interest itself and (2) the physical certificate evidencing that interest. English law regards share certificates as mere evidence of title, whereas New York law regards those same certificates as negotiable instruments in and of themselves and also as a physical embodiment of the share.³⁶ Shares are choses in action, or, as discussed above, personal property that is intangible, and one's rights therein can only be exercised through legal action.³⁷ In other words, a corporate share is a documentary intangible evidencing a contractual ownership right in a corporate entity that the law of the relevant jurisdiction is willing to enforce. In this regard, shares are analogous to any other type of personal property in that they can be bought, sold, pledged, encumbered, and so forth.³⁸

2. Development of the Modern Securities System

The modern system of trading and holding corporate securities is unique. Under the old system, existing during the early years of modern industry and corporations, a corporation issued shares of corporate ownership via transfer of a physical certificate to the new owner of that share; delivery of the certificate was a key transaction.³⁹ This system proved problematic for bookkeeping purposes, but still exists with some smaller, privately owned corporations.⁴⁰ Use of uncertificated securities developed in the 1970s as a response to this old system of physical certificate delivery and allowed the issuer of a share to record ownership of that share on its books without passing along a physical certificate to an owner; recording the transaction was all that was needed.⁴¹ The practice of a corporation recording ownership of shares itself, and either issuing or not issuing certificates to owners of those shares, is referred to as the "direct holding system" for securities.

The "indirect holding system" for securities developed in the late 1970s and remains the most archetypal system for trading corporate shares in modern commerce. Under this system, a corporate issuer of shares sends share certificates to a clearinghouse corporation, called the Depository Trust Company (DTC).⁴² These shares are registered and immobilized with the DTC and the DTC is listed as the registered owner of the shares on the books of the issuer.⁴³ The DTC then transfers the shares to brokerage firms or investment banks, called intermediaries, which in turn sell those shares to investors.⁴⁴ The DTC lists the relevant intermediary as the owner of those shares on its books and the

35. OOI, *supra* note 19 at 44-45.

36. *Id.* at 45 (citing British Companies Act of 1985; New York Uniform Commercial Code § 8-105 (2001)).

37. *Id.* at 46.

38. SANDRA M. ROCKS & CARL S. BJERNE, *THE ABCS OF THE UCC ARTICLE 8: INVESTMENT SECURITIES* 30 (Amelia H. Boss ed. 1997).

39. *Id.* at 1.

40. *Id.*

41. *Id.* at 2.

42. *Id.* at 9.

43. *Id.* at 9.

44. *Id.*

intermediary lists the investor as the owner on its books.⁴⁵ As a result, the issuer of the shares usually has no idea which individual investors actually own its stock.⁴⁶

In the indirect holding system, investors retain a “security entitlement” in the shares they purchase from the intermediary, which is defined as a bundle of rights (including, *inter alia*, property rights in the underlying security, rights against third parties, and *in personam* rights of action against the intermediary) held by an entitlement holder that can be asserted against the relevant intermediary and others in relation to a financial asset.⁴⁷ The intermediary in turn retains a “securities account” on behalf of the investor, which allows the intermediary to credit the account of the investor and otherwise dispose of shares held in that account as an agent of the investor.⁴⁸ With a clearer understanding of both the direct and indirect holding systems for securities, the situs of those shares for purposes of choice-of-law rules and attachment will become more intuitive.

3. The Location of Corporate Shares

Given the dichotomous nature of corporate shares (i.e., as an intangible ownership interest and as evidence of that interest in documentary form), their physical location is not self-evident. Thus, a choice-of-law analysis for corporate shares may shed some light on possibilities for the location of corporate shares. The first possibility is the *lex situs* rule, or the physical location of the corporate share.⁴⁹ By definition, however, a corporate share is fundamentally a right-duty relationship and as such has no physical location.⁵⁰ The situs of shares then becomes subject to concepts such as corporate residence, the location of certificates evidencing that share, and so forth.⁵¹ The second possibility will be the *lex incorporationis* rule, or the place of the issuer’s incorporation. Under English law, the *lex incorporationis* rule is the law to be applied to corporate shares.⁵² This view has also been incorporated in New York and Canadian case law.⁵³ Other choice-of-law possibilities include the law of the situs of the stock register⁵⁴ and the law of the place of the corporate share transaction (*lex loci actus*).⁵⁵

In the United States, the old rule regarding choice-of-law for corporate

45. *Id.* at 3.

46. *Id.*

47. *Id.* at 40.

48. *Id.* at 43.

49. OOI, *supra* note 19 at 13-16.

50. *Id.* at 14.

51. *Id.* at 15.

52. *Id.* at 17 (citing *Macmillan Inc. v. Bishopsgate Investment Trust PLC* (No. 3) [1996] 1 WLR 387). See JOANNA BENJAMIN, INTERESTS IN SECURITIES: A PROPRIETARY LAW ANALYSIS OF THE INTERNATIONAL SECURITIES MARKETS (2000) (providing an in-depth analysis of English law and international law relating to securities).

53. *Oliner v. Canadian Pac. Ry. Co.*, 311 N.Y.S.2d 429, 432-33 (N.Y. App. Div. 1970); *Brown v. Beleggings-Societeit* (1961) 29 DLR (3d) 673.

54. OOI, *supra* note 19 at 26-33.

55. *Id.* at 34-38.

shares was that the law of the situs of the corporation applied in all situations.⁵⁶ This rule was eventually rendered outdated as disputes over corporate shares began to turn more on the shares as property, as opposed to documents relating to corporate governance.⁵⁷ The location of the stock certificates themselves becomes the applicable choice-of-law provision for disputes regarding those shares as property.⁵⁸

Article 8 of the Uniform Commercial Code is consistent with this result. Section 112 of Article 8 gives creditors a right of action to levy or attach shares held by a debtor.⁵⁹ The purpose of this provision is to prevent the transfer of stock bearing encumbrances not facially obvious.⁶⁰ Under this section, certificated stock is located where the certificate itself is located.⁶¹ Uncertificated stock is located where the issuing chief executive officer is located.⁶² Security entitlements in stocks, or accounts held by an intermediary, are located where the intermediary is located.⁶³ Securities held by an Article 9 secured party are located where the secured party is located.⁶⁴ This form of attachment under Section 8-112 is the commercial law equivalent of Rule B attachment, and its pronouncements on corporate share situs should be considered instructive here. No evidence exists that admiralty law has adopted, or would adopt, a set of rules for corporate share situs different from those stated in the Uniform Commercial Code.

One interesting wrinkle in the location of corporate shares is the prominence of the intermediary holding system for stock trading, as explained above. Shares traded through intermediaries are uncertificated shares, and the generally accepted rule internationally with regard to uncertificated shares is that they are located where the intermediary is located.⁶⁵ This is the so-called “PRIMA Rule” thesis advanced by Singaporean legal scholar Maisie Ooi.⁶⁶ This rule is logically correct because having control over a security entails being able to dispose of that security without further action from the issuer or transferor of that security.⁶⁷ In the direct holding system, the person possessing that control would be the investor, but in the indirect holding system that person is the intermediary because the investor in the indirect holding system cannot act on the security without further action from the intermediary.⁶⁸

56. Fletcher Cyclopedia of the Law of Corporations § 5101 (citing *Jellinik v. Huron Copper Mining Co.*, 177 U.S. 1, 12 (1900)).

57. *Id.* § 5101.

58. *Id.* But see Del. Code Ann. tit. 8 § 169 (1967) (requiring all stock in Delaware corporations to be considered located in Delaware for choice of law purposes, regardless of the location of the certificates).

59. U.C.C. § 8-112 (1994).

60. Fletcher Cyclopedia, *supra* note 56 at § 5104 (citing *Calista Corp. v. Deyoung*, 562 P.2d 338, 345 (Alaska 1977)).

61. U.C.C. § 8-112(a); see also *Iron Pasha v. Shanghai Grand China Shipping Co.*, 2013 AMC 2540 (W.D. Wash. 2013); *Nastro v. D’Onofrio*, 263 F. Supp. 2d 446, 453 (D. Conn. 2003).

62. U.C.C. § 8-112(b).

63. *Id.* § 8-112(c).

64. *Id.* § 8-112(d).

65. Ooi, *supra* note 19 at 48, 78; accord U.C.C. § 8-112(c); ROCKS & BJERNE, *supra* note 38 at 103.

66. Ooi, *supra* note 19 at 78.

67. ROCKS & BJERNE, *supra* note 38 at 32.

68. See *id.*

In the indirect holding system, the intermediary is located wherever the intermediary maintains the office identified in the relevant securities account statement as serving the investor's account, or, if not applicable, wherever the intermediary's chief executive officer is located.⁶⁹ For choice-of-law purposes, the local law of the intermediary will govern most disputes related to securities traded through the indirect holding system.⁷⁰

4. Attachment of Corporate Shares under Rule B: A Case Analysis

Attachment of corporate shares is a relatively uncharted area of Rule B jurisprudence. A recent and instructive example of attachment of corporate shares under Rule B, *Iron Pasha v. Shanghai Grand Shipping Co.*, illustrates some principles relating to a United States court's interpretation of the location of shares.⁷¹

The plaintiff in *Iron Pasha* levied a Rule B attachment order against several defendants to obtain security for a pending English arbitration award relating to a breached charter party agreement.⁷² The plaintiff seized \$1.3 million worth of stock in Hainan Airlines allegedly held by one of the defendants in the U.S. District Court for the Western District of Washington.⁷³ That defendant failed to respond to the attachment for more than one year, at which point the court ordered Hainan Airlines to mark this encumbrance on the defendant's stock certificates.⁷⁴ The defendant filed a motion to dismiss the complaint and a motion to vacate the attachment on the grounds that the shares at issue were not located within the Western District of Washington and that the court therefore lacked jurisdiction.⁷⁵ Hainan Airlines is a Chinese corporation that trades its stock on the Shanghai Stock Exchange.⁷⁶ The shareholder defendant in *Iron Pasha* was also domiciled in China and held its Hainan Airlines stock certificates in China.⁷⁷

The court in *Iron Pasha* held that the shares being attached were not located in the Western District of Washington and granted the defendant's motion to dismiss and the motion to vacate attachment for lack of subject matter jurisdiction.⁷⁸ The court reasoned that, under a choice-of-law analysis, China had the most significant contacts to that dispute because (a) the relevant corporation is Chinese, (b) the stock exchange is Chinese, and (c) the defendant

69. *Id.* at 104.

70. U.C.C. § 8-110(b) (1994).

71. 2013 AMC 2540 (W.D. Wash. 2013).

72. *Id.* at 2541-42.

73. *Id.* at 2542. The plaintiff's basis for seizing shares of Hainan Airlines in the Western District of Washington was that the shares were a debt owed by Hainan Airlines, a company that maintained flights between Seattle and China, and therefore followed Hainan Airlines wherever it went. See Reply Brief for Plaintiff at 5, *Iron Pasha v. Shanghai Grand China Shipping Co.*, 2013 AMC 2540 (W.D. Wash. 2013) (No. C12-0621); Plaintiff's Response to Motion to Quash at 9, *Iron Pasha v. Shanghai Grand China Shipping Co.*, 2013 AMC 2540 (W.D. Wash. 2013) (No. C120-0621).

74. *Iron Pasha*, 2013 AMC at 2542-43.

75. *Id.* at 2544.

76. *Id.* at 2546.

77. *Id.*

78. *Id.* at 2544.

is Chinese and held the shares at issue in China.⁷⁹

The plaintiff in *Iron Pasha* argued that U.S. law should govern that dispute because the law of the forum governs Rule B disputes; the court in that case dismissed this argument as tautological because the law of the forum cannot also be used to determine if the court has subject matter jurisdiction.⁸⁰ The court reasoned that, even if U.S. law applied, Chinese law would govern under a choice-of-law analysis because U.S. law would recognize that the shares were located where the corporation was domiciled or where it has its principal place of business, both of which would be China.⁸¹ Under either Chinese or U.S. law, the stock at issue was located in China, and the Western District of Washington lacked jurisdiction to hear a Rule B dispute.⁸²

5. Implications of Rule B Attachment for the Direct and Indirect Holding Systems

Returning to the intermediary holding system, when shares are traded through intermediaries, the stocks are considered located where the intermediary is domiciled or has its principal place of business. For attachment purposes, this will almost always be the Southern District of New York due to the prevalence of brokering and investment banking there. The result in *Iron Pasha* is interesting because the stocks there may have been traded on the Shanghai Stock Exchange. This poses problems for plaintiffs pursuing Rule B attachment in the United States. If it becomes common for foreign stock exchanges to pervade stock transfers, Rule B can become increasingly difficult in the United States. This is because the shares, assuming that Maisie Ooi's PRIMA Rule theory (which states that the location of the intermediary governs disputes about those shares) is correct, are unlikely to be "located" in any judicial district in the United States.

Also, if certificated shares are considered to be located where the issuing corporation is incorporated, under the *lex incorporationis* rule, the District of Delaware is likely to be the forum in which to attach certificated securities.

6. Summary of Corporate Shares

If a maritime plaintiff wishes to attach corporate shares held by a defendant, that plaintiff must first determine whether the shares are held in the direct or indirect holding system. If the shares are traded through a direct holding system, certificated shares (i.e. shares possessing an actual physical certificate of ownership) can be attached only in the jurisdiction in which the physical certificate is located. If they are uncertificated shares, the shares can be attached where the issuing corporation's chief executive officer is located because this will be where the records evidencing the investor's ownership of those shares can be found. If the shares are traded through an indirect holding system, as they

79. *Id.* 2545-46.

80. *Id.* at 2546-47.

81. *Id.* at 2548 (citing *Jellenik v. Hurren Copper-Mining Co.* 177 U.S. 1, 13 (1900); *Writ Franklin Petroleum Corp. v. Gruen*, 139 F.2d 659, 660 (5th Cir. 1944)).

82. *Id.* at 2549-50.

likely will be, the plaintiff will need to attach shares wherever the intermediary holding those shares is located. This will be either (a) the location where the intermediary has the office that maintains the investor's account, as indicated on the investor's account receipt, or (b) the location of the intermediary's chief executive office.

B. Electronic Fund Transfers

Another intangible of value is the electronic fund transfer (EFT). During the first decade of the twenty-first century, attachment of EFTs under Rule B in New York was a hot topic issue. The U.S. Court of Appeals for the Second Circuit subsequently outlawed the attachment of EFTs and, given the prevalence of EFTs through banks located in New York, much of the following discussion is hypothetical for this reason. But a number of cases involving attachment of EFTs under Rule B, while this practice was still permissible, discussed the location of EFTs. Further, while attachment of EFTs in the Second Circuit has been outlawed, this practice theoretically remains legal throughout the rest of the United States. Therefore, an examination of cases on Rule B attachment of EFTs will provide valuable insight into this type of commercial property.

EFTs are wire transfers from one bank to another, often through an intermediary bank that is located in New York.⁸³ EFTs are generally regarded as pending debts owed by the sending bank to the beneficiary of the transfer.⁸⁴ Article 4A of the Uniform Commercial Code governs wire transfers such as EFTs and distinguishes a mere "fund transfer" from a "payment order."⁸⁵ The latter involves an order from one bank to credit the account of a client, while the former involves the same transaction but through an intermediary bank; EFTs are an example of the former.⁸⁶ Given New York's prominence as a financial hub, the U.S. District Court for the Southern District of New York, the Second Circuit Court of Appeals, and the New York state courts have particular expertise in this area of commercial law.

The Second Circuit's foray into Rule B attachment of EFTs began with that court's decision in *Winter Storm Shipping Ltd. v. TPI*.⁸⁷ In *Winter Storm*, the plaintiff, a Maltese company, chartered a vessel to the defendant, a Thai company, and later filed a Rule B attachment action in New York against the defendant when it failed to pay the full amount of the charter.⁸⁸ Pursuant to that attachment order, the relevant bank in New York put a stop on incoming funds destined from the defendant.⁸⁹ The defendant eventually wired funds through that bank from Thailand intended for a bank in Scotland; the bank deducted the amount specified in the attachment order and allowed the remaining sum to pass

83. See GOLD, *supra* note 23 at 19-22 (providing discussion of EFTs under New York law).

84. *Id.*

85. *Id.* at 18-19, 32-37.

86. *Id.*

87. 310 F.3d 263, 273 (2d Cir. 2002).

88. *Id.* at 265-66.

89. *Id.* at 266.

along to Scotland.⁹⁰

The Second Circuit in *Winter Storm* held that EFTs were property located within a judicial district and were thus subject to seizure under Rule B.⁹¹ The court reasoned that Rule B is a broad remedy and does not exclude electronic transactions, even though they pass through a judicial district for only a second, and also relied on the Second Circuit's decision in *United States v. Daccarett*, a non-maritime case which held that EFTs are property subject to civil forfeiture.⁹² The defendants in the *Daccarett* decision argued in 1993 that EFTs were only communications between a sending bank and a beneficiary bank and only became "property" once received by the beneficiary bank.⁹³ The Second Circuit disagreed with that argument and held that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable *res* under the forfeiture statute;" the panel in *Winter Storm* found this reasoning persuasive as it applied to Rule B attachment.⁹⁴

The Second Circuit's decision in *Winter Storm*, which created powerful precedent for admiralty plaintiffs in holding that EFTs were attachable property at New York banks, created a flurry of litigation between 2002 and 2009.⁹⁵ Concern arose that shipping interests would no longer conduct business using U.S. dollars or New York banks.⁹⁶ The New York banking industry also began to complain about the increasing burden being placed on it by these attachment orders.⁹⁷ Cases within the Second Circuit between 2002 and 2009 continued applying the holding in *Winter Storm* while also reining in that decision's expansive scope.⁹⁸

In *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, a three-judge panel of the Second Circuit reversed the decision in *Winter Storm* and prohibited attachment of EFTs in that circuit.⁹⁹ There, the plaintiff filed a Rule B attachment order on the defendant's incoming EFT in order to recover funds due on a charter party.¹⁰⁰ The Second Circuit held that *Winter Storm* was wrongly decided because (a) it was based on erroneous reasoning and (b) it had a burdensome effect on the New York financial industry and federal court system.¹⁰¹ The court there based its holding, in large part, on the *Winter Storm* decision's flawed reliance on *Daccarett*, which the *Jaldhi* court reasoned merely

90. *Id.*

91. *Id.* at 278.

92. *Id.* at 275-76 (citing *U.S. v. Daccarett*, 6 F.3d 37, 55 (2d Cir. 1993)).

93. *Daccarett*, 6 F.3d at 55.

94. *Id.*; see also *Winter Storm*, 310 F.3d at 277-78.

95. See Jillian Benda, Comment, *No Calm After the Storm: The Rise of the Rule B Attachment Cottage Industry*, 31 TUL. MAR. L.J. 95 (2006); Ian F. Taylor, Comment, *Maritime Madness: Rule B, Electronic Fund Transfers, Maritime Contracts, and The Explosion of Admiralty Litigation in the Southern District of New York*, 34 TUL. MAR. L.J. 211 (2009).

96. See Gold, *supra* note 23 at 40-41.

97. *Id.*

98. See *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 445-46 (2d Cir. 2006); *Consul Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104, 109-10 (2d Cir. 2008).

99. 585 F.3d 58, 58 (2d Cir. 2009).

100. *Id.* at 64-65.

101. *Id.* at 68, 71.

held that EFTs could be forfeited if traceable to illegal activity, not that EFTs were property of a beneficiary while still in transit.¹⁰² The court distinguished Rule B from civil forfeiture on the basis that the former is a *quasi in rem* remedy while the latter is a pure *in rem* remedy; the two are thus distinguishable.¹⁰³ The *Jaldhi* court further cited to New York state law, which explicitly does not recognize EFTs as property.¹⁰⁴

The Second Circuit in *Jaldhi* explicitly stated that *Winter Storm* was both wrongly decided and unduly burdensome to both the judicial system and the backbone of the New York economy—the finance industry. An issue exists, however, as to whether *Jaldhi* actually did overturn *Winter Storm*.¹⁰⁵ *Jaldhi* was a decision of a three-judge panel of the Second Circuit reversing a previous decision of that same circuit. A federal appellate court decision can be overturned by either (a) an *en banc* hearing of that same circuit or (b) a decision of the United States Supreme Court.¹⁰⁶ The panel in *Jaldhi* nonetheless stated that its decision should carry the force of an *en banc* ruling because it was a “mini *en banc*” decision, in which the panel judges sent drafts of their decision to all other judges on that circuit and, apparently, received no objections.¹⁰⁷ An argument could be made that an informal “mini *en banc*” decision does not grant a three-judge panel the authority to overrule circuit precedent.¹⁰⁸ With that in mind, it is possible that *Jaldhi*, despite its vehemence, never properly overruled the *Winter Storm* decision.

Assuming *Jaldhi* did effectively overrule its own circuit precedent, an issue exists as to whether the Second Circuit in *Jaldhi* made an effective legal argument. First, *Jaldhi* arguably conflates commercial law and admiralty law by relying so heavily on Article 4A of the New York Uniform Commercial Code. Second, the court bases much of its holding on an amicus brief submitted by The Clearing House Association LLC, which is an advocacy group for the banking industry.¹⁰⁹ The amicus brief states the myriad of ways in which banks in New York were inconvenienced by the flurry of EFT attachment orders since the *Winter Storm* decision.¹¹⁰ The *Jaldhi* court almost certainly caved to the whims of the banking industry. The burden on financial institutions due to increased processing of attachment orders was likely overplayed somewhat and should not have interfered with the ability of a court sitting in admiralty to seize increasingly transient international assets. *Jaldhi* also left open the question as to the property ownership of EFTs held by an intermediary bank.¹¹¹ For the time being, however, Rule B attachment of EFTs in the Second Circuit is not

102. *Id.* at 68-69.

103. *Id.* at 69.

104. *Id.* at 70 (citing N.Y. U.C.C. § 4-A-503).

105. *Id.* at 71.

106. See Gold, *supra* note 23 at 58-60.

107. *Jaldhi*, 585 F.3d at 67.

108. See Gold, *supra* note 23 at 58-60.

109. *Jaldhi*, 585 F.3d at 62.

110. *Id.*

111. See Gold, *supra* note 23 at 23, 32-35 (arguing that N.Y. U.C.C. Article 4A does not allow any entity to have a property interest in an EFT).

permitted.

One issue touched on in *Winter Storm* and its progeny, and not substantially disrupted by *Jaldhi*, was that EFTs are located, at least for hypothetical attachment purposes, where the intermediary bank is located.¹¹² The Second Circuit in *Jaldhi* never explicitly said that EFTs were not property located within a judicial district—it merely held that EFTs were not property of the defendant for purposes of Rule B attachment.¹¹³ In other words, it focused on the “what” and not the “where” when it overruled *Winter Storm*.

For this reason, a district court outside of the Second Circuit would not be bound by the decision in *Jaldhi* that EFTs are not subject to Rule B attachment and could allow such attachment over EFTs passing through other financial centers besides New York. In practical terms, this is unlikely to happen given the prevalence of major banks that have headquarters in New York.

One theory for attachment of EFTs could be that these funds are attachable wherever they are converted into U.S. dollars. Clearinghouse banks, which represent banks that process EFTs, buy U.S. dollars from the Federal Reserve Bank. The Federal Reserve Bank maintains twelve branches throughout the United States located in Atlanta, Boston, Chicago, Cleveland, Dallas, Kansas City, Minneapolis, New York, Philadelphia, Richmond, San Francisco, and St. Louis. The argument could be advanced that attachment of EFTs could be made wherever the individual Federal Reserve branch is located that converted the EFT into U.S. dollars.

It is unlikely, however, that another federal appellate circuit would be willing to disregard the Second Circuit’s fairly emphatic holding in *Jaldhi* on this issue. At any rate, attachment of EFTs under Rule B outside of the Second Circuit has not been tested and will not be binding on other circuit courts until the United States Supreme Court speaks on this issue. Such a process could theoretically be permissible because an EFT, while passing through the United States, is located wherever the intermediary bank is located.

C. Bank Accounts

This article’s discussion of electronic fund transfers and corporate shares segues well into attachment of bank accounts under Rule B. Bank accounts are depositories of personal and corporate assets. Bank accounts are essentially a debt owed by a bank to a client.¹¹⁴ While a layperson would likely assume that funds he or she deposits into a bank remain at that physical bank location, those funds are really just intangibles held by that bank; the deposited money itself has no physical location. A judge for the Southern District of New York observed the bizarre nature of this everyday phenomenon: “In this weird age, the location of an intangible, especially a bank account, is a metaphysical question. By and large, bank deposits exist as electronic impulses embedded in silicon chips. In a sense, therefore, bank funds are both everywhere and nowhere.”¹¹⁵

112. *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263, 278 (2d Cir. 2002); *Jaldhi*, 585 F.3d at 71.

113. *Jaldhi*, 585 F.3d at 71.

114. See MANN, *supra* note 5 at 5.

115. *Yayasan Sabah Dua Shipping v. Scandinavian Liquid Carriers*, 335 F. Supp. 2d 441, 448 (S.D.N.Y.

A bank account is defined as “any deposit or credit account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit.”¹¹⁶ Bank accounts can be either regular (special) deposit accounts (i.e., for keeping of valuables in a safe deposit box) or irregular (general) (i.e., for accumulation of credit in the account of a customer at a bank through the lending of funds to that bank).¹¹⁷ Bank accounts as payment systems utilize documents—namely, checks or payment orders—which represent an obligation or a promise to pay the bearer of that document.¹¹⁸ These documents, as monetary obligations, are not the money itself, but still form the core of this payment system, which is really comprised of intangible credits and debits within bank accounts.¹¹⁹

Article 9 of the Uniform Commercial Code states that the method of perfecting a security interest in a deposit account is through control of that account, often through an agreement between a creditor, a debtor, and the debtor’s bank to grant the creditor a property interest in that deposit account.¹²⁰ Control is, indeed, the *only* method of perfecting a security interest in a bank account.¹²¹ Control can arise under Section 9-314(a) of Article 9 through an agreement between the secured party, the debtor, and the bank wherein the bank agrees to comply with instructions from the secured party.

Control over a bank account for security interest purposes is significant with regard to the location of a bank account because “control” under Article 9 is often exercised by a contractual relationship between persons (similar to a chose in action, a typical intangible) and not a possessory interest over a tangible thing. In other words, to control a bank account, one must levy control over the bank as a corporate, intangible whole and not exercise possession over the precise, tangible funds deposited into that bank, as would be sufficient for perfection of other types of property under Article 9, such as goods.¹²²

1. The Location of Bank Accounts for Attachment Purposes

The location of bank accounts has enormous future implications for Rule B attachment. Bank account attachments have not been a major issue for Rule B purposes to date, but it is likely to be in the near future as plaintiffs in admiralty attempt to secure increasingly illusive funds. Courts have held that bank accounts are clearly seizable *res* under Rule B.¹²³

2. The Separate Entity Rule for Accounts in Bank Branches

Maritime plaintiffs seeking attachment of bank accounts under Rule B have

2004), *rejected on other grounds* by *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006).

116. U.C.C. § 4-104(a)(1); *accord* U.C.C. § 9-102(a)(29).

117. DUBOVEC, *supra* note 7 at 120-21.

118. *Id.* at 87; *see also* MANN, *supra* note 5 at 5.

119. DUBOVEC, *supra* note 7 at 87.

120. U.C.C. §§ 9-104, 9-314(a).

121. *Id.* § 9-312(b).

122. *See id.* § 9-310(b)(6).

123. *See, e.g.,* *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 46 (2d Cir. 1996).

a strong interest in determining the exact branch at which the defendant maintains the account to be attached because of the existence of the so-called “Separate Entity Rule” in some jurisdictions in the United States. The Separate Entity Rule states that branches of a bank are considered to be separate banks for purposes of, *inter alia*, attachment of bank accounts.¹²⁴ Therefore, attachment must be had on the actual branch where the defendant maintains this account.¹²⁵ This rule is a facet of New York commercial law and is followed in the Second Circuit.¹²⁶

The Separate Entity Rule was first stated in *Det Bergenske Dampskibsselskab v. Sabre Shipping Company*, a case involving a Rule B writ of attachment served on the defendant’s bank in Brooklyn to reach funds in an account at that bank maintained in Manhattan.¹²⁷ The court held that the writ of attachment on a bank branch in the Eastern District of New York was insufficient to reach funds held at a branch of the same bank located within the Southern District of New York.¹²⁸ Service on the bank would have had to have been done in the district in which the defendant’s account was actually maintained by that bank.¹²⁹ Courts in the Second Circuit and in New York state court have continued to reaffirm the Separate Entity Rule.¹³⁰ The Separate Entity Rule is also followed in the United Kingdom.¹³¹ And district courts in other circuits have also applied the Separate Entity Rule.¹³²

A number of jurisdictions do not follow the Separate Entity Rule and instead hold essentially that attachment of funds at a branch in one jurisdiction is sufficient to reach funds held anywhere that bank can be found.¹³³ For example,

124. *Det Bergenske Dampskibsselskab v. Sabre Shipping Corp.*, 341 F.2d 50, 53 (2d Cir. 1965).

125. *Id.*

126. *Id.*

127. *Id.* at 52.

128. *Id.*

129. *Id.*

130. *See generally* *Parbulb II A/S v. Heritage Mar.*, S.A., 935 N.Y.S. 2d 829 (N.Y. Sup. Ct. 2011) (affirming the Separate Entity Rule); *Limonium Mar.*, S.A. v. *Mizushima Mariner*, S.A., 961 F. Supp. 600 (S.D.N.Y. 1997) (upholding the Separate Entity Rule and holding that a writ of attachment on a New York bank was insufficient to reach funds in that bank held in Scotland); *Nat. Shipping & Trading Corp. v. Weeks Stevedoring Co.*, 252 F. Supp. 275 (S.D.N.Y. 1966) (affirming the Separate Entity Rule); *D/S A/S Flint v. Sabre Shipping Corp.*, 228 F. Supp. 384 (E.D.N.Y. 1964) (holding prior to *Bergenske* that funds do not have a situs in a bank account in a district other than the district containing the branch maintaining that account); *Hohenstein Shipping Co. v. Feliz Compania Naviera, S.A.*, 236 F. Supp. 216 (E.D.N.Y. 1964).

131. *See Richardson v. Richardson* [1927] Prob. 228.

132. *Sara Lee Corp. v. Gregg*, 2004 WL 23120116, at *3 (M.D.N.C. 2003) (adopting the Separate Entity Rule); *see generally* *Desert Wide Cabling & Installation v. Wells Fargo*, 958 P.2d 457 (Ariz. Ct. App. 1998); *see also* *Woodlands, Ltd. v. Westwoods Ins. Co., Ltd.*, 965 F. Supp. 13, 15 (D. Md. 1997) (holding that attachment of funds at a bank branch in Maryland was insufficient to reach funds held in an account at the same bank at a branch in Virginia); *see generally* *Shinto Shipping Co. v. Fibrex & Shipping Co.*, 425 F. Supp. 1088 (N.D. Cal. 1976).

133. *See, e.g.*, *Marisco, Ltd. v. Am. Samoa Government*, 889 F. Supp. 2d 1244, 1250 (D. Haw. 2012) (stating that the Hawaii Supreme Court would deem the Separate Entity Rule obsolete and would not adopt this rule); *see also* *Acme Contracting, Ltd. v. Toltest Inc.*, 2008 WL 4534175, at *7 (E.D. Mich. 2008) (speculating that the Michigan Supreme Court would reject the Separate Entity Rule) (“such a rule is entirely obsolete in today’s world of highly sophisticated and centralized banking operations”); *Tribie v. United Dev. Group Intern. LLC*, 2008 WL 5120769, at *3 (S.D. Fla. 2008) (stating that Florida does not recognize the Separate Entity Rule); *In re Marriage of Kosmond*, 830 N.E.2d 596, 601 (Ill. App. Ct. 2005) (stating that Illinois does not recognize the Separate Entity Rule) (*citing* *Bank of Montreal v. Clark*, 108 Ill. App. 163, 166-67 (1903)).

in *Day v. Temple Drilling Co.*, the U.S. District Court for the Southern District of Mississippi held that a debt can be attached under Rule B wherever the debtor can be found for purposes of personal jurisdiction.¹³⁴ As noted previously in this Article, bank accounts held by a bank are essentially debts owed by the bank to the depositing client. Therefore, under the holding in *Day*, a bank account exists wherever the depository bank can be found for personal jurisdiction purposes. A bank can be found for personal jurisdiction purposes wherever it has a branch office. Thus, a bank account can be attached in any district in which that bank maintains a branch.

This rule, and not the Separate Entity Rule, seems logically correct given the modern realities of banking. Bank accounts are really electronic credits existing in favor of the holder of that bank account against the bank. In a sense, those credits exist everywhere and nowhere at the same time. The branch at which a customer maintains a bank account is entirely arbitrary given that funds from this account can be credited to the customer at any other branch of that bank. But given the continuing existence of the Separate Entity Rule for bank branches, maritime plaintiffs should know whether the jurisdiction in which they seek Rule B attachment of a bank account follows this rule and, if so, where the exact branch office that maintains the relevant account is located.

3. Ancillary Problems for Attachment of Bank Accounts

In addition to considerations stemming from the Separate Entity Rule, some recent cases have shed light on additional problems for maritime plaintiffs who are attaching bank accounts under Rule B. The Southern District of New York in *Yayasan Sabah Dua Shipping v. Scandinavian Liquid Carriers* stated that a bank account exists, in the case of a bank with a domestic office located in New York and a fictitious offshore office in the Cayman Islands, at the bank's domestic office because, given that the Cayman branch was essentially a ghost office, control over that account effectively existed in New York.¹³⁵ In addition, the Second Circuit in *Allied Maritime, Inc. v. Descatrade S.A.* held that funds held by an Indian bank that had a branch office in New York did not confer jurisdiction on the district court for a Rule B attachment of funds if those funds were not actually held at the New York branch.¹³⁶ *Allied Maritime* is likely an outlier and would presumably only apply to small, foreign banks with transient presence in the United States. The Southern District of New York also held in *Alaska Reefer Management LLC v. Network Shipping Ltd.* that property of the defendant must actually exist in an account at the time of attachment.¹³⁷ Courts have held that secured lines of credit are not attachable property because a line of credit is "nothing more than a privilege to incur a debt."¹³⁸ Last, a defendant's

134. *Day v. Temple Drilling Co.*, 613 F. Supp. 194, 196-97 (S.D. Miss. 1985).

135. 335 F. Supp. 2d 441, 448-49 (S.D.N.Y. 2004) *rejected on other grounds* by *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006).

136. 620 F.3d 70, 74 (2d Cir. 2006).

137. 68 F. Supp. 3d 383, 388-89 (S.D.N.Y. 2014) (holding that funds transferred into a defendant's account solely through the clerical error of the bank could not be attached under Rule B).

138. *Oceanfocus Shipping, Ltd. v. Naviera Humboldt, S.A.*, 962 F. Supp. 1481, 1482-83 (S.D. Fla. 1996).

property held in a bank account maintained by an agent of the defendant for the defendant's benefit can be attached under Rule B.¹³⁹

4. Summary of Bank Accounts

Under Rule B, a bank account in a jurisdiction that follows the Separate Entity Rule can only be attached in the district in which the relevant branch office maintaining the defendant's account is located. If the jurisdiction does not follow the Separate Entity Rule, attachment can be had in any district in which the bank that maintains the defendant's account maintains a branch office.

D. Letters of Credit

Letters of credit are another area in which Rule B attachment may become prevalent. A letter of credit is a "definite undertaking . . . by an issuer to a beneficiary . . . to honor a documentary presentation by payment or delivery of an item of value"¹⁴⁰ and is governed by Article 5 of the Uniform Commercial Code. A letter of credit transaction involves three parties: (1) an applicant;¹⁴¹ (2) an issuer;¹⁴² and (3) a beneficiary.¹⁴³ In practice the transaction will work as follows: an applicant will go to a bank (the issuer) to obtain a letter of credit from that bank to serve as a form of payment to be provided to a designated party (the beneficiary) in exchange for the sale of goods or the provision of services between the beneficiary and the applicant.¹⁴⁴ Letters of credit are freely assignable and beneficiaries will often assign the proceeds of a letter of credit to finance its performance to the applicant in some way.¹⁴⁵ Commercial entities are eager to accept letters of credit as payment because such letters are backed by the creditworthiness of the issuing bank, which is almost always beyond dispute, and not the creditworthiness of the applicant.¹⁴⁶

When these transactions are made internationally, as they often are in the shipping industry, the issuing bank will be located in the country in which the applicant is located and will need to rely on banks in the beneficiary's country to

139. See *Triton Container Int'l. Ltd. v. Kien Hung Shipping Co.*, 2003 U.S. Dist. LEXIS 18302, at *8 (C.D. Cal. Apr. 15, 2003).

140. U.C.C. § 5-102(10) (1995).

141. *Id.* at § 5-102(a)(2) (statutorily defined as "a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer").

142. *Id.* at § 5-102(a)(9) (statutorily defined as "a bank or other person that issues a letter of credit . . .").

143. *Id.* at § 5-102(a)(3) (statutorily defined as "a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.").

144. G. Hamp Uzzelle, *Letters of Credit*, 10 MAR. L. 47, 47 (1985).

145. *Id.* at 49 (adding that letters of credit are also commonly issued in the maritime context to guarantee payment of charter hire and payment of freight).

146. DAVID M. WEISS, *AFTER THE TRADE IS MADE: PROCESSING SECURITIES TRANSACTIONS* 391 (3d ed. 2006); see also *Union Planters Nat. Bank v. World Energy Sys. Assoc.*, 816 F.2d 1092, 1094 (6th Cir. 1987) ("The letter of credit is a commonly used means of payment in international business transactions because it assures the purchaser that payment will not be affected unless and until the seller has performed, but it also allows the seller to finance the sale by providing an easily assignable domestic contract right.").

carry out disbursement of funds under a letter of credit.¹⁴⁷ These banks are often either “advisers”¹⁴⁸ or “confirmers.”¹⁴⁹ In these situations, a beneficiary in a foreign country will receive payment under a letter of credit by appearing before the bank indicated in the letter of credit as being responsible for disbursing funds.¹⁵⁰ Letters of credit are also frequently used in the maritime context as a substitute for a bond or letter of undertaking in order to release a seized vessel or some other property.¹⁵¹ Parties seeking attachment of letters of credit under Rule B should be aware that rights under a letter of credit are inchoate until a beneficiary has complied with all formalities stated in the letter of credit.¹⁵²

1. The Location of a Letter of Credit

Article 5 of the Uniform Commercial Code states that, unless the parties elect otherwise, a letter of credit will be located at the registered address of the issuer of that letter or at the address of a nominated person under that letter of credit.¹⁵³ An issuer or nominated person in a letter-of-credit context will almost always be a bank or some other financial institution. Article 5 states that a bank branch is considered a separate entity for jurisdiction and choice-of-law purposes.¹⁵⁴ These provisions are significant because they comport with the commercial intent of the parties as evidenced in the letter of credit. Therefore, a maritime plaintiff will need to identify the correct bank branch for attachment of a letter of credit. In practice, this will be wherever the parties intended for the letter of credit to be payable to the beneficiary.

An admiralty case from the U.S. Court of Appeals for the Sixth Circuit, *Union Planters National Bank v. World Energy Systems Associates*, illustrates how Rule B attachment of letters of credit works.¹⁵⁵ In that case, the defendant, World Energy Systems Associates (WESA), was a coal trader who contracted with a Taiwanese company for shipment of coal; payment was made pursuant to a letter of credit issued by a Taiwanese bank.¹⁵⁶ Union Planters National Bank in Memphis was designated in the letter of credit as the party to reimburse the beneficiary.¹⁵⁷ Payment under the letter of credit was contingent upon presentation of documents showing that the contracted-for coal had been

147. See Uzzelle, *supra* note 144 at 47-48.

148. U.C.C. § 5-102(a)(1) (statutorily defined as “a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended”).

149. *Id.* at § 5-102(a)(4) (statutorily defined as “a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another”).

150. See Uzzelle, *supra* note 144 at 47-48.

151. *Id.* at 49.

152. *Daikan Love, S.A. v. Al-Haddas Bros. Enter., Inc.*, 584 F. Supp. 782, 784 (S.D.N.Y. 1984) (stating that letters of credit are executory contracts until all documents have been presented in accordance with the terms of the letter of credit and executory contracts are not attachable *res*); *accord Reibor Int’l, Ltd.*, 759 F.2d at 266; *see also Sisalco do Brasil, Ltd. v. Fiacao Brasileira De Sisal, S.A.*, 450 F.2d 419, 423 (5th Cir. 1971).

153. U.C.C. § 5-116(b) (1995).

154. *Id.* (essentially adopting the Separate Entity Rule from New York).

155. 816 F.2d 1092 (6th Cir. 1987).

156. *Id.* at 1093-94.

157. *Id.* at 1094.

properly loaded aboard ships bound for Taiwan.¹⁵⁸ Plaintiffs, Texas Chartering and Hemmert International, were creditors of WESA and served a Rule B writ of attachment upon Union Planters in the U.S. District Court for the Western District of Tennessee to secure WESA's appearance there.¹⁵⁹ At the time of attachment, WESA had not presented documents to Union Planters in conformity with the terms of the letter of credit and, as a result, the issuing bank in Taiwan had not disbursed any funds to Union Planters.¹⁶⁰ The issue was whether attachment of the letter of credit was proper given that funds had not actually been disbursed.¹⁶¹ The court held that attachment was improper because the issuing bank had not transmitted funds to Union Planters in Memphis, and thus no attachable *res* existed in that district.¹⁶²

For purposes of this Article, *Union Planters* is instructive because the court does not dispute that attachment in the Western District of Tennessee would have been proper had funds under the letter of credit actually been disbursed to a bank in that district at the time of attachment.¹⁶³ The case supports the proposition that attachment of a letter of credit is appropriate wherever the party designated in the letter of credit to disburse funds to the beneficiary is located. In all probability, this will be the specific bank branch designated to disburse funds under the relevant letter of credit.

2. Summary of Letters of Credit

Letters of credit are valuable instruments in maritime commerce. Letters of credit can be attached wherever the bank branch authorized by the terms of that letter to disburse funds is located. Maritime plaintiffs should be advised that all formalities under a letter of credit must be complied with before attachable *res* will be found to exist.

E. Negotiable Instruments

Negotiable instruments under commercial law constitute an additional type of intangible property that may be attachable in admiralty under Rule B. Negotiable instruments are a form of "commercial paper" and are governed by Article 3 of the Uniform Commercial Code. Negotiable instruments include bank drafts, promissory notes, cashier's checks, bills of exchange, and (in admiralty) bills of lading.¹⁶⁴ Fundamentally, these instruments involve an obligation between one person to pay another (in the case of "notes"), or an obligation between one person to pay another person via a third party, usually a

158. *Id.*

159. *Id.* at 1093-94.

160. *Id.* at 1094-95.

161. *Id.*

162. *Id.* at 1097.

163. *Id.* at 1098. A separate issue in this case involved the fact that WESA had assigned proceeds under the letter of credit to a number of other creditors in advance of the funds arriving in this case and the court stated that, even if funds had properly arrived, attachment would not have worked because the *res* had already been assigned to other parties.

164. U.C.C. § 3-104 (2002).

bank (in the case of “drafts”).¹⁶⁵

Negotiable instruments are critical to global commerce because they facilitate an easy and reliable transfer of goods in exchange for payment. Key to the success of these instruments is their “negotiability.” For a commercial instrument to be “negotiable” it must constitute a (a) signed (b) writing that states (c) an unconditional (d) promise or order (e) to pay a set amount of money (f) to an order or bearer (g) on demand or at a definite time and which (h) contains no other undertakings or requirements.¹⁶⁶ Another key aspect of transferability is the “holder in due course” doctrine, which states that (a) a holder (b) of a negotiable instrument that appears complete and authentic (c) who took the instrument in an ordinary transaction (d) for value (e) in good faith and (f) without notice of any defects in the instrument shall be entitled to all rights in the instrument and shall pass along those same rights to subsequent transferees.¹⁶⁷

In the maritime industry, the most prominent negotiable instrument is the order bill of lading. Bills of lading are instruments that evidence three legal relationships: (1) a receipt documenting the physical transfer of goods from a shipper to a carrier, (2) a contract of carriage between the shipper and the carrier, and (3) a document representing title to the goods being transferred.¹⁶⁸ In contrast to a “straight” bill of lading, which is a mere document of title and is not negotiable,¹⁶⁹ an “order” bill of lading satisfies the requirements for negotiability under Article 3 if it (a) runs to the order of a named consignee and (b) does not state on its face that it is non-negotiable.¹⁷⁰ “Straight” bills of lading are printed on white paper and “order” bills of lading are printed on yellow paper.¹⁷¹

In a typical transaction utilizing a bill of lading, a buyer of goods instructs a bank to open a letter of credit with the seller’s bank.¹⁷² The carrier of those goods issues a bill of lading upon receiving the goods, and the bill of lading becomes part of the goods document package.¹⁷³ The seller then takes the bill of lading to its own bank where the buyer’s letter of credit was previously opened and offers the bill for cash.¹⁷⁴ The seller’s bank sends the bill of lading to the

165. STEPHEN C. VELTRI, *THE ABCS OF THE UCC: ARTICLE 3 NEGOTIABLE INSTRUMENTS & ARTICLE 4 BANK DEPOSITS & COLLECTIONS* (Amelia H. Boss, ed., 1997) at 7.

166. U.C.C. § 3-104(a).

167. U.C.C. § 3-302; *see also* VELTRI, *supra* note 163 at 3.

168. *See* Richard Brett Kelly, *The CMI Charts a Course of the Sea of Electronic Sea Interchange: Rules for Electronic Bills of Lading*, 16 TUL. MAR. L.J. 349, 351 (1992); *see also* Emmanuel T. Laryea, *Paperless Shipping Documents: An Australian Perspective*, 25 TUL. MAR. L.J. 255, 268 (2000).

169. *See* U.C.C. § 7-104 (2003).

170. 49 U.S.C. § 80103(a) (2012); *see also* U.C.C. § 7-104(1); *see also* 22 WILLISTON ON CONTRACTS § 59:9 (4th ed.) (2014) (general information on bills of lading in maritime commerce). Note that order bills of lading can be negotiable in the United States because an indorsee of a bill of lading can obtain an abstract of title that is superior to that of the original holder. *See* Com. Savings Bank of Grand Rapids v. Mann, 206 A.D. 297 (N.Y. App. Div. 1923). This would not be true under the law of the United Kingdom or Australia. *See* Laryea, *supra* note 168 at 269.

171. *See* *Estherville Produce Co. v. Chicago, R.I. & P.I., Co.*, 57 F.2d 50, 53 (8th Cir. 1932).

172. Kelly, *supra* note 168 at 353.

173. *Id.*

174. *Id.*

buyer's bank and receives cash in exchange.¹⁷⁵ The buyer's bank then notifies the buyer who claims the bill of lading by cash payment.¹⁷⁶ The buyer in possession of the bill of lading thus has legal title to the goods and takes delivery from the carrier.¹⁷⁷

This transaction is frequently accomplished in the modern day via use of an "electronic bill of lading," which is extremely attractive to shipping companies due to the lack of paper assets that can become lost or stolen.¹⁷⁸ The Comité Maritime International (CMI) devised a set of rules to govern transactions utilizing electronic bills of lading more than 25 years ago.¹⁷⁹ In an electronic bill of lading transaction, the parties will typically agree initially to be bound by the CMI Rules.¹⁸⁰ The shipper will then transfer goods to the carrier and the carrier will transmit notice of receipt of the goods to a shipper's "electronic address," which fulfills the essential functions of a paper bill of lading.¹⁸¹ This receipt must contain certain terms, including, *inter alia*, a "Private Key" that will allow the holder of the bill to transact future sales or transfers of ownership of the goods.¹⁸² Once the shipper comes into possession of the "Private Key," it becomes the holder of all rights in the goods being shipped.¹⁸³ The holder is then free to sell the goods to a buyer, but the holder must transfer its rights to the buyer once the sale is complete.¹⁸⁴ The carrier must next notify the holder of the expected date and time of delivery, and the holder must notify the carrier if the consignee of the goods is someone else.¹⁸⁵

1. Rule B Attachment of Negotiable Instruments

Negotiable instruments, specifically bills of lading (in either paper or electronic form), present a number of problems for plaintiffs hoping to attach such instruments under Rule B. The primary problem, given a negotiable instrument's nature as a documentary intangible representing a legal relationship between parties, is the location of such an instrument. The intuitive answer is wherever the instrument itself can be located, but such an approach conflicts with various choice-of-law analyses governing negotiable instruments. Those instruments have held that the law of negotiable instruments varies from the law of the place where the instrument is payable¹⁸⁶ to the law of the place of

175. *Id.*

176. *Id.*

177. *Id.*

178. Kelly, *supra* note 168 at 353.

179. See Comité Maritime International, *Rules for Electronic Bills of Lading* (Mar. 22, 2016, 5:22 PM), <http://comtemaritime.org/Rules-for-Electronic-Bills-of-Lading/0,2728,12832,00.html> [hereinafter CMI].

180. Kelly, *supra* note 168 at 362.

181. *Id.*

182. See CMI, *supra* note 179 at Rule 7.

183. *Id.* at Rule 7(a)(1) (stating that the holder is the only person with the right to take possession of the goods upon delivery at their destination).

184. *Id.* at Rule 7(b).

185. *Id.* at Rule 9(a).

186. *Nat. Union Fire Ins. Co. of Pittsburg v. Alexander*, 728 F. Supp. 192, 199 (S.D.N.Y. 1989) (applying Texas law).

execution or delivery¹⁸⁷ to the law of the location at the time of transfer¹⁸⁸ to simply the law of the place with the most significant relationship to the instrument.¹⁸⁹

In keeping with the overall theme of this Article, it can be conceived that order bills of lading are located wherever they can be freely disposed. As negotiable instruments, order bills of lading can therefore be thought to be located wherever their holder can be found. Article 3 of the Uniform Commercial Code places a great deal of emphasis on the union of the negotiable instrument and the holder. The instrument itself is of key significance and rights contained within that instrument are only capable of being utilized by the holder of that instrument. Order bills of lading are also bearer paper and, therefore, the physical location of the instrument is of prime importance.

If the bill of lading is a paper document, its location will be wherever the physical piece of paper is located. If the bill of lading is electronic, the “bill of lading” will come into existence upon satisfactory completion of an electronic receipt and should be considered located wherever the party with rights thereunder is physically located. In practice, in either a paper or electronic scenario, the initial holder of a bill of lading will be the shipper,¹⁹⁰ and the shipper is free to transfer its rights under the bill of lading to any other party. So whether a bill of lading exists in documentary or electronic form, the rights thereunder exist wherever the holder of those rights is physically located. In this sense, the bill of lading *itself* exists wherever the holder of the rights thereunder is located. That location will be the location of the shipper or the location of any transferee of the shipper’s rights under the bill of lading.

This scenario will present obvious problems for Rule B attachment because the holder of an order bill of lading is also the person with rights to goods represented in the bill of lading, and a Rule B plaintiff cannot attach property if the “owner” of that property is also found in that judicial district.¹⁹¹ But if a plaintiff seeks to compel another party to a shipping transaction – for example, the original shipper who has transferred the order bill of lading to another party but who still intends to take possession of the shipped goods at some point—to appear, attachment of order bills of lading, as negotiable instruments under Rule B, may be an attractive prospect.

2. Summary of Negotiable Instruments

Negotiable instruments are most commonly utilized in the maritime industry in the form of order bills of lading. These bills of lading are attachable *res* under Rule B and are attachable wherever the rights thereunder are freely disposable by their holder. In practice, this will be wherever the holder itself is

187. *Wallen v. Loving*, 609 F. Supp. 159, 161 (N.D. Ill. 1985) (applying Illinois law).

188. *See generally* *Capital Investors Co. v. Executors of Morrison’s Estate*, 484 F.2d 1157 (4th Cir. 1973) (applying Virginia law).

189. *Devine v. Meyer Assocs.*, 60 A.D.2d 592 (N.Y. App. Div. 1977) (applying New York law).

190. *See* CMI, *supra* note 179 at Rules 4(b)(i), 7(a).

191. The very purpose of Rule B attachment is to compel the appearance of an absent defendant before a court. This rule is therefore irrelevant if that defendant is already physically within the territorial jurisdiction of that court.

physically located.

F. Intellectual Property Rights

A final, and indeed novel, category of intangible property that may be attached under Rule B is intellectual property rights. Intellectual property entails the classic trio of copyright, trademark, and patent rights, in addition to things such as domain names, design patents, and so forth.¹⁹² Intellectual property rights grant the right holder a monopoly over a particular work that qualifies for protection under intellectual property laws. The force of federal law in the United States supports this monopoly right.¹⁹³ This right primarily entails the right to exclude others from using a right holder's intellectual property and, in this regard, is not distinct from any other type of property.

Intellectual property rights are created, either by registration with a federal office (i.e., with the U.S. Patent and Trademark Office for patents and trademarks),¹⁹⁴ or by fulfillment of certain statutory requirements (i.e., for copyright, by creating "[an] original [work] of authorship fixed in a tangible medium of expression").¹⁹⁵ By granting these protections at the federal level, the United States government indicates that intellectual property rights are enforceable by the right holder anywhere within the legal boundaries of the United States.

1. Rule B Attachment of Intellectual Property

The question of whether intellectual property rights are attachable under Rule B is uncharted territory: this author is aware of no attempt to attach this kind of property in admiralty. Article 9 of the Uniform Commercial Code classifies, however, intellectual property rights as "general intangibles," which suggests that the law anticipates that such rights can be encumbered by a security interest.¹⁹⁶ Bankruptcy courts have held that security interests can be attached to intellectual property rights.¹⁹⁷ This would suggest that intellectual property rights can be subject to other forms of legal encumbrance, such as maritime

192. See DAVID LINDSAY, *INTERNATIONAL DOMAIN NAME LAW* (2007) (providing an examination of the international treatment of domain names).

193. See U.S. CONST., art. I, § 8 ("Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries"); 17 U.S.C. § 101 *et seq.* (Copyright Act); 35 U.S.C. § 1 *et seq.* (Patent Act); 15 U.S.C. § 1051 *et seq.* (Lanham Act).

194. 35 U.S.C. § 21 *et seq.*; 15 U.S.C. § 1051 *et seq.*

195. 17 U.S.C. § 102(a); see also *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986). Note that while copyright itself can vest in the United States by mere compliance with statutory requirements, copyrights are only enforceable if they are registered with the U.S. Copyright Office. In most jurisdictions other than the United States, copyrights are enforceable whether or not they are registered. See JAMES FAWCETT & PAUL TORREMANS, *INTELLECTUAL PROPERTY AND PRIVATE INT'L LAW* (2d ed. 2011) (including information on international copyright protections); see also MIREILLE VAN EECCHOUD, *CHOICE OF LAW IN COPYRIGHT & RELATED RIGHTS: ALTERNATIVES TO THE LEX PROTECTIONIS* (2003) (same).

196. U.C.C. § 9-102(a)(42) (2010).

197. See *In re Coldwave Systems LLC*, 368 B.R. 91, 97 (Bankr. D. Mass. 2007) (stating that an Article 9 security interest can be perfected against a patent, as a general intangible, only by filing a financing statement against that patent).

attachment under Rule B.

Assuming that intellectual property rights can be attached under Rule B, the issue arises as to where a maritime plaintiff would find intellectual property rights in order to file an attachment action against them. For example, assume that a plaintiff wanted to attach Maersk's trademark in the United States to recover for unpaid bunker oil. Where would this plaintiff find Maersk's trademark to attach it?

Three possibilities seem to exist: (1) where the right is enforceable (i.e., in our hypothetical, wherever Maersk can prevent someone else from using its trademark), (2) where the right is registered (i.e., Alexandria, Virginia, where the Patent and Trademark Office is physically located) (or, in the case of copyright, where the substance of the copyrightable material is located), or (3) where the right itself can be found for personal jurisdiction (i.e., wherever Maersk can be said to be "using" its trademark, which, in practical terms, could be just about anywhere). In reality, only the first option makes sense. The United States government, through its registration system, is stating that the holder of an intellectual property right (here, Maersk) can prevent others from using its property anywhere in the United States. Theoretically, the right holder can go to court anywhere in the country to enforce its rights. In this sense, intellectual property rights exist everywhere in the United States in equal measure, and it would make sense, on that basis, that they can be attached anywhere.

This possibility is particularly compelling for maritime plaintiffs. In the example used above, Maersk's trademark is certainly property of Maersk—Maersk itself is not necessarily located in every district in the United States for jurisdiction or for service of process, but its trademark theoretically exists in every district in the United States. If this theory is correct, it would make intellectual property rights unique among intangibles for Rule B purposes. Hypothetically, the bunker oil plaintiff here could attach Maersk's trademark in the United States District Court for the District of South Dakota, a district in which Maersk is unlikely to be found *in personam* and a district that has rarely, if ever, attached any property of Maersk under Rule B. This may be a particularly shrewd technique for future users of Rule B attachment.

2. Summary of Intellectual Property

Given the federal nature of intellectual property rights in the United States, attachment of intellectual property rights of all kinds could be made in any district court in the United States.

VI. CONCLUSION

The foregoing analysis in this Article surveys likely attachment locations for corporate shares, bank accounts, letters of credit, negotiable instruments, and intellectual property rights. Case law relating to electronic fund transfers was included in this analysis because, while the attachment of electronic fund transfers has been outlawed in the Second Circuit, the location of these fund transfers nonetheless sheds light on the location of other commonly used types of intangible property. The locations of intangible property mentioned above

reiterate the rule of thumb mentioned in heading II of this Article: Intangible property is located wherever it can be utilized or disposed of by the right holder. No reason exists to think that this rule is not applicable to Rule B of the Supplemental Rules of Admiralty.

This Article's inquiry into the location of intangible property will be helpful for maritime practitioners given the increasing use of intangible assets as money in the maritime industry.¹⁹⁸ In addition, this industry is becoming increasingly more complex, in part due to the rise of alter egos.¹⁹⁹ As a result, Rule B attachment will continue to be a powerful tool to compel appearances by maritime parties and to secure increasingly mobile assets in maritime commerce.

198. See Uzelle, *supra* note 144 at 70.

199. See *Vitol, S.A. v. Primerose Shipping Co., Ltd.*, 708 F.3d 527 (4th Cir. 2013).